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MASTER OF MILITARY STUDIES

**THE POSSE COMITATUS ACT, STILL RELEVANT: TERRORISM AND THE FEDERAL
BUREAU OF INVESTIGATION RESPONSE CAPABILITIES**

**SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF MILITARY STUDIES**

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Date: 14 April 09

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 2009		2. REPORT TYPE		3. DATES COVERED 00-00-2009 to 00-00-2009	
4. TITLE AND SUBTITLE The Posse Comitatus Act, Still, Relevant: Terrorism and the Federal Bureau of Investigation Response Capabilities				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) United States Marine Corps, Command and Staff College, Marine Corps University, 2076 South Street, Marine Corps Combat Development Command, Quantico, VA, 22134-5068				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 29	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

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EXECUTIVE SUMMARY

Title: The Posse Comitatus Act, Still Relevant: Terrorism and the Federal Bureau of Investigation Response Capabilities.

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Thesis: The limitations contained in the Posse Comitatus Act of 1878 regarding the domestic use of the military are still relevant and the capabilities of Federal law enforcement to detect and tactically engage potential terrorists obviate the need to use military forces directly to counter the activities of terrorists within the U.S.

Discussion: Many have argued that the terrorist attacks of September 11, 2001 are a threat to the National Security and should be dealt with using the full weight of the government, including the use of military forces to respond to threats or attacks within the United States and its Territories. The proponents of such argue that the Posse Comitatus Act, passed in 1878 at the end of the Reconstruction Period following the American Civil War, overly restricts the use of such forces within the United States and that it creates confusion on the part of the military as to their legal participation in assisting civil authorities. They would have the Posse Comitatus Act revised or repealed in order to decriminalize the use of military force within the United States, opening the door for broadened use of the military as a civil constabulary. This study seeks to show that the Posse Comitatus Act is still relevant, that it does not overly restrict the use of military forces to assist civil law enforcement, that the tension it provides helps preserve our liberties, and that the Federal civil response to terrorist threats or acts is robust enough to preclude the use of military forces in direct actions against suspected terrorist targets within the United States.

Conclusion: The Posse Comitatus Act is relevant because it creates healthy tension between civil and military domestic responsibilities. The Federal Bureau of Investigation possesses the capacity to successfully respond to the full range of terrorist threats or acts while preserving civil liberties.

Preface

Having spent over nine years with the Hostage Rescue Team of the Federal Bureau of Investigation, I have been involved in countering threats against the United States and its citizens both domestically and abroad. Much of this has focused on those who perpetrate, direct, or otherwise abet terrorist acts. It has been my privilege to work alongside the U.S. military and other civilian agencies in pursuit of the terrorist threat.

Heinous as these acts and the criminals who commit them are, the U.S. should not allow the civil liberties of its citizens to slip away in the name of security. However well intentioned, it is a slippery slope to utilize the military in pursuit of domestic law enforcement activities.

I would like to thank the Marine Corps University for the opportunity to address this topic from the law enforcement perspective. Thanks are also due to Dr. John Gordon for keeping me on track and to Dr. Pauletta Otis and Section Chief Steven Fiddler, Commander of the HRT, for their interest and encouragement.

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This study proposes that the limitations contained in the Posse Comitatus Act of 1878 regarding the domestic use of the military are still relevant and that the capabilities of Federal law enforcement to detect and tactically engage potential terrorists obviate the need to use military forces directly to counter the activities of terrorists within the U.S.

On September 11, 2001, terrorists belonging to Al-Qaeda hijacked several jetliners originating within the United States. Their intent was to use the planes as missiles to inflict serious damage to the U.S. economy and psyche. They succeeded in creating a sense of vulnerability within the U.S. populace. In order to punish those responsible for facilitating this attack and to restore the population's security, the full force of the U.S. Government was directed at finding and bringing to justice those members of Al-Qaeda adhering to Osama Bin Ladin's call to strike it. U.S. military forces entered Afghanistan to eliminate the threat and Federal law enforcement agencies commenced exhaustive investigative efforts both within the U.S. and around the globe to deter ongoing plans for more attacks and to arrest those complicit with the acts already committed. In light of the threat of terrorist attack, ranging from an individual assailant to the use of Weapons of Mass Destruction (WMD), within the United States, the issue of whether the

military should be used to directly counter the threat as it occurs domestically has become a contentious one.

The Posse Comitatus Act of 1878 was attached as a rider to the army appropriations bill. Its genesis lay in the controversy surrounding the use of military forces in enforcing civil laws in the southern states and on the western frontier.¹ During the Reconstruction Period following the American Civil War, Federal troops were used to restore order, help form state governments, and enforce civil law. Southerners chafed under the authority of the troops while the U.S. Marshals found them an easy and ready means of enforcing Federal law. The issue in the south culminated with the presidential election of 1876 where complaints of Federal troops securing votes for Rutherford B. Hayes' caused considerable angst.² On the western frontier, military commanders were often the only source of law and order. They exercised civil authority by arresting those they believed to be criminals and by operating against Native Americans deemed a threat to settlers. This led to an often arbitrary application of law, resulting in violations of constitutional rights.³ Since its passage, this act has generated a prodigious amount of discussion within the Federal government, the courts, and the military. The result is a mixture of case law, policy,

and professional opinion which guides the domestic use of military force.

There has been much discussion as to the validity of the Posse Comitatus Act with regard to the United States' ability to use all of its national power to defend itself against terrorist attacks on its home territory. One argument is that the Posse Comitatus Act does not actually prohibit the use of military force in domestic situations and therefore should be replaced with a new law that would spell out the rules and regulations to govern when and what laws the military would have the authority enforce.⁴ Another is that since we are at war with terrorists, they are a military adversary and should not have civil law applied to them. This leads to the discussion that terrorists are military targets even when operating domestically. Jeffery Brake, in a report for Congress, said that the U.S. would be better off by using the full range of military capabilities to respond to a domestic crisis.⁵ Since Homeland Security Directive 8: National Preparedness lumps in threatened or actual domestic terrorist attacks with major disasters and other emergencies, one could pull the thread that would lead to having military units conducting arrest and search and seizure operations against suspected terrorists operating domestically.⁶ Brake goes

on to state that if a threat imperils our national survival then the military should be utilized against that threat.⁷

In support of the use of military force domestically, writers on the subject point to various historical situations that occasioned the involvement of military force to restore order or enforce Federal laws. James S. Campbell points out that for much of our history, the Army and the Navy were the only real means of homeland defense.⁸ Listed below are examples of use of military force to restore order or enforce laws⁹:

- French and Indian War 1759-1763, prior to the creation of the United States
- The Whiskey Rebellion, 1794.
- Kansas Territory, 1850's.
- The Fugitive Slave Act 1850.
- Utah Territory, 1857.
- Post Civil War Reconstruction, 1865-77.
- Washington and Wyoming Territories, 1885-1886.
- Civil Rights Laws, 1963.
- Los Angeles Riot, 1992.

In each of these cases the military was not the force of first choice. Military force was utilized because the threat exceeded the capability of law enforcement to respond or it was the only source of authority available at all.¹⁰ Very early in our country's history, Congress demonstrated its intention with respect to law enforcement in the United States through passage of the Judiciary Act of 1789. This Act created the Federal District Courts and with it the post of U.S. Marshal as a

vehicle to enforce the Federal laws. To assist him, a U.S. Marshal had the authority to employ the power of the county, or the posse comitatus.¹¹ It would have been very easy for Congress to rely on the militia or a standing army to enforce Federal law but the aversion to a standing army and a national police force in the early days of this country is well documented. There were relatively few Federal laws then and so most law enforcement centered on the states, counties, and cities. As the country grew, so too did the scope of involvement of the Federal government in the laws and regulations which concerned the entire country.¹²

After the Civil War the States that participated in the Confederacy were divided into five military districts. Each district had Federal troops assigned to it, essentially as an occupation force, for the purposes of maintaining order, overseeing the dissolution of Confederate forces, and to ensure compliance with the authority of the Federal government. These districts also had a U.S. Marshal appointed to them who was responsible for enforcing Federal laws. According to the Congressional Record, generals assigned to the military districts reported using troops on many occasions to suppress strikes, enforce local law, collect taxes, and arrest persons accused of violating the law.¹³ The fact that civil authorities,

U.S. Marshals and county sheriffs, made such frequent use of the military in this fashion created considerable concern within the military as to the legality of their actions. Congressman William Kimmel, Maryland, in advocating for the Posse Comitatus Act, stated that this assistance was:

...in such open and flagrant violation of law that these generals suggest the enactment of such laws as will define the duties of soldiery...¹⁴

The Posse Comitatus Act was never intended to prohibit the use of the military, rather, it sought to preserve civil liberties by ensuring that anyone who used them outside the scope of the law would be punished. Clearly the wording of the Act left it to Congress to define when and how the military would be used domestically.

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁵

Congress addresses the appropriateness of the use of military resources in Title 10 and Title 21, U.S. Code. Title 10, sections 331-335, and 672, enable the use of the military to suppress insurrection, whether in aid of a State or outright, to

enforce Federal authority, and restore public order when that act lay beyond a State's capacity to do so.

Title 21 addresses the same with respect to counter-narcotic activities. In these circumstances, State or Federal authorities may request assistance through the President or the Department of Defense, or the President may direct such action be taken at his own discretion. The effect of the Posse Comitatus Act has been to create a constant healthy tension with regard to what the military can do domestically in this country. This tension fuels debate which ultimately secures the Constitutional liberties of the citizens of and the persons residing in the U.S. Removing the criminality regarding the domestic use of the military would weaken the effect of the policies and guidelines currently in place.

It matters not that nobody has been convicted of violating the Posse Comitatus Act. In fact, this demonstrates its effectiveness. The result of this constant dialogue reveals itself in the Presidential Decision Directives and Homeland Security Presidential Decision Directives which spell out the roles and responsibilities for a Federal response to terrorist threats, terrorist acts, natural disasters, and other crisis situations.

Presidential Decision Directive (PDD) 39 was signed into law in 1995 by President William Jefferson Clinton. It provides the foundation for U.S. policies and responses to terrorism:

It is the policy of the United States to deter, defeat and respond vigorously to all terrorist attacks on our territory and against our citizens, or facilities, whether they occur domestically, in international waters or airspace or on foreign territory. The United States regards all such terrorism as a potential threat to national security as well as a criminal act and will apply all appropriate means to combat it. In doing so, the U.S. shall pursue vigorously efforts to deter and preempt, apprehend and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks.¹⁶

Of note, this statement defines terrorism as a criminal act as well as a potential threat to national security. PDD 39 goes on to state that "Within the United States, we shall vigorously apply U.S. laws..." as they relate to terrorism activities and generate new laws to counter emerging threats.¹⁷ It further designates the Federal Bureau of Investigation (FBI) as the head investigative agency with regard to terrorism within the U.S. and the Federal Emergency Management Agency (FEMA) as the lead agency for consequence management. In 1997, the Terrorism Incident Annex to the Federal Response Plan laid out the concept of operations that would be used to implement PDD 39. Besides detailing roles, responsibilities, and command and control relationships, this annex outlined several very important

conceptual issues. First, it reaffirms the FBI as the lead agency responsible for managing the counter-terrorism response within the U.S. Secondly, that no single agency, State or Federal, possesses the capacity to respond unilaterally to terrorist threats or incidents especially if Weapons of Mass Destruction are involved.¹⁸ Essentially, this means that all agencies must work together to respond to these situations and that these responses will be directed by civil and not military authority.

Regardless of whether terrorist activities within the U.S. are categorized as violations of Federal law or as acts of war, Congress intends that these matters be directed by civil law enforcement, using military assistance only to the minimal extent necessary. Certainly there are circumstances where civil capabilities may not be sufficient to enforce order or lack some specialized skill or asset necessary for the situation. Consistent with U.S. policy, the military may assist civil authorities, just as is prescribed and intended by the Posse Comitatus Act. To fulfill this function, military forces need not be experts in Federal or local law. Law enforcement agencies operate under numerous guidelines, legal and administrative, that serve to ensure that civil rights violations are not committed during the conduct of their

operations. Far better for the military forces to be more cautious in their interaction with the civilian populace than open themselves up to prosecution for civil rights violations. The Posse Comitatus Act serves as the incentive for civil authorities to ensure the directions they give the military fall within the boundaries established by Congress and the judiciary.

This study does not refute the need for military assistance, Federal or National Guard, during large scale events but will demonstrate that the FBI possesses the authority and the capability to conduct counter-terrorism operations such that it is not necessary to have the military enforce Federal law, to whit conduct arrest and search and seizure operations within the U.S. PDD 62 reaffirms the roles and responsibilities laid out in PDD 39 with respect to the use of WMD and/or cyber-warfare.¹⁹

Homeland Security Presidential Directive 5, 2003:
Management of Domestic Incidents (HSPD5) established the National Incident Management System (NIMS) in order to create a unified system of control with regard to "the prevention, preparation, response, and recovery from terrorist attacks, major disasters, and other emergencies."²⁰ It reinforces PDD 39 and 62 and updates and clarifies agency roles and responsibilities. It also establishes the Secretary of Homeland Security as the lead official during domestic incidents and

stipulates the conditions under which the Secretary shall coordinate the Federal response to such. HSPD 5 also designates the Attorney General, acting through the FBI, as the responsible authority for criminal investigations regarding terrorist acts or threats within the U.S. or involving its citizens or institutions outside the U.S.²¹ Clearly it is the intent of the Executive office to extend the liberties proscribed in the Constitution, its amendments, and the Declaration of Independence to persons suspected of involvement in these matters as they occur as outlined above by categorizing them as criminal acts. This precludes the use of military forces to action suspected terrorist targets within the U.S. unless such target lay outside the capability of law enforcement to successfully interdict. As will be shown below, the FBI, in concert with local law enforcement, is capable of successfully responding to a wide range of terrorist threats or acts with personnel who are sworn law enforcement officers. This will ensure that the liberties expected by persons in the U.S. will not be violated and that those suspected of crimes will be afforded blind, transparent justice.

The National Response Framework (NRF), January 2008, replaces the National Response Plan as the most current guideline for the response to domestic incidents. It reaffirms

HSPD 5 with regard to coordination of Federal assets and upholds the premise of utilizing law enforcement and civil authority to counter terrorist threats or acts domestically.²²

Folded within the NRF is the Terrorism Incident Law Enforcement and Investigation Annex. It details the planning assumptions and considerations specific to terrorist threats or incidents, noting that such could occur at any time with little or no warning and could involve a single site or many which may be spread throughout the U.S. This annex directs that the FBI will manage investigation and intelligence activities through its Joint Operations Center (JOC). The Special Agent in Charge (SAC) of the affected FBI field office or offices will manage the threat or incident based on a scalable, flexible, and graduated response.²³

Threats are assessed as to their credibility and feasibility. This may involve a process involving a long-term investigation or it may be generated by recent information indicating the need for an immediate assessment. Since the FBI has fifty-six field offices located throughout the U.S. and its territories, each comprising satellite offices or Resident Agencies (RA), numerous joint task forces, and Legal Attaches assigned to numerous U.S. Embassies, it is uniquely positioned to respond to threats, incidents, or conduct the detailed

investigations necessary to successfully prevent and prosecute these matters.²⁴ The prevention of a terrorist attack against the United States or its citizens is the number one priority for the FBI.²⁵ A credible threat or the initiation of an incident brings the entire resources of the FBI to bear to resolve the issue. Indeed, the resources of the entire Federal government will be utilized "consistent with U.S. law...assisting the Attorney General to identify perpetrators and bring them to justice."²⁶ The FBI fulfills this responsibility for the Attorney General and coordinates the efforts of other law enforcement agencies and other Federal departments. While national level policy documents recognize that the response to such situations requires the cooperation and expertise of all national assets, the FBI has continuously enhanced its capabilities so that it can provide timely response with assets that make the need for direct military involvement in law enforcement functions unnecessary.

Upon the initiation of an incident, either a credible threat or an initiated action, the SAC of the field office with jurisdictional responsibility will establish a command post. This may be enhanced to become a Joint Operations Center (JOC) in order to coordinate regional and/or national assets. The primary organizational mechanism that coordinates the response

for the FBI is the Critical Incident Response Group (CIRG). Formed in 1994, CIRG provides the FBI and its field offices expertise in crisis management, threat assessment and analysis, and technical and tactical operations. CIRG also provides training to state, local, and international law enforcement agencies. Illustrating the level of importance placed on its responsibilities, an Assistant Director (AD) heads CIRG. This ensures a very short chain of command during crises: The AD reports to an Executive Assistant Director who reports to the Deputy Director or the Director, FBI. Through its functional sections, CIRG harnesses the ability to provide, throughout the U.S., command and control, coordination, logistics, connectivity to the National Command Structure, and technical and tactical response capabilities. These sections are: 1. Investigative and Operations Support Section; 2. Tactical Section; 3. Aviation Surveillance and Technical Operations Section; 4. Strategic Information and Operations Section.²⁷

The Investigative and Operations Support Section houses the National Center for the Analysis of Violent Crime (NCAVC) and the Operations Support Branch. The NCAVC provides FBI field offices, state, local, and international law enforcement, and other Federal agencies with behavioral-based assessments. They provide profiles of offenders, those likely to commit offenses,

and assess the resolve of persons to follow through with the anticipated criminal act. This is a critical factor in determining the credibility of a terrorist threat. Operations Support brings additional resources and expertise to a command post or JOC in the form of logistical support, incident management control, and specialized communications. The Units which comprise Operations Support are: Rapid Deployment and Logistics Unit, Crisis Management Unit, Communications and Information Technical Unit, and the Special Events Management Unit. Operational command of the Domestic Emergency Support Team lies with the Crisis Management Unit and its members also assist the Department of State during the deployment of the Foreign Emergency Support Team.

The Aviation, Surveillance and Technical Operations Section (ASTOS) provides the FBI mobility and surveillance support for law enforcement investigation and enforcement activities. It brings aircraft and organic maintenance capabilities that can be deployed anywhere in the U.S. to directly support evidence gathering or arrest operations. For specific Weapon of Mass Destruction (WMD) threats or incidents, the National Assets Response Unit, located within ASTOS, coordinates the FBI tiered response at the incident site and at FBI headquarters. The tiered response consists of state and local assets, local FBI

field offices, regional FBI assets, and national level FBI assets. This provides for timely, adequate response to an incident throughout the U.S. Critical to a WMD response is the Bomb Data Center (BDC) and Hazardous Devices Response Unit (HDRU). These assets provide training for Special Agent Bomb Technicians, coordination of research and development, and WMD preparedness initiatives for state and local bomb squads. Combined, they provide the FBI with the technical response teams necessary to successfully assess, access, diagnose, and render safe devices involved with a WMD incident.

The Tactical Section is made up of the Hostage Rescue Team (HRT) and the Tactical Support Branch (TSB). These components comprise the direct action capability for the FBI. While all Special Agents of the FBI are trained in lethal and non-lethal techniques in the application of arrest and detention situations, the Tactical Section provides highly trained personnel capable of responding to the most volatile, dangerous circumstances that may be encountered in criminal or counter-terrorist incidents.

The HRT, created in 1983, gives the FBI and the Federal government a "tactical, counterterrorist team capability within the Federal Law Enforcement community for situations where the only other option would require the domestic use of Department

of Defense Special Forces Units to enforce civilian law."²⁸ The need for such a capability was recognized in the wake of the 1972 Munich Olympic Games, where Israeli athletes were taken hostage, as the U.S. prepared to host the games in 1984. Federal Republic of Germany police and military units had responded to the situation which ended with multiple hostage casualties. Clearly, it was the intent of U.S. Federal government to keep the resolution of such a situation domestically within the justice system, reducing the chance for civil rights violations and preserving the transparency and oversight contained in the U.S. legal system. Upon resolution, the site of an incident becomes a crime scene and is processed as such. The HRT personnel are sworn law enforcement officers who are authorized to arrest and detain persons pursuant to Title 18, U.S. Code. Further, they are available to appear in court, preserving an accused person's right to confront the witnesses that are against them.

As a full time tactical unit, the HRT maintains a readiness posture such that it can deploy to any location or environment within four hours of notice. While its name suggests a very narrow scope of operations, the HRT performs a wide variety of tactical law enforcement operations commensurate with the abilities of military special forces to operate in maritime,

rural, and urban environments.²⁹ Further, they are capable of performing these functions in conditions which are contaminated by chemical, biological, radiological, or nuclear material. The HRT is part of a tiered tactical response which includes the Special Weapons and Tactics Teams (SWAT) assigned to each FBI field office. The training and coordination of the SWAT units is the responsibility of the TSB. It ensures that each team adheres to a standard training doctrine and that equipment issues are uniform so that the teams are capable of fully integrated operations. These teams are also trained to operate in WMD environments. The FBI SWAT teams provide a rapid response capability for situations that may occur throughout the U.S. Additionally, designated teams provide enhanced regional capabilities. Approximately 1,200 Special Agents are assigned to these teams, forming a robust national response capability.³⁰

Other assets that support the HRT and SWAT units are the Tactical Helicopter Unit (THU), Tactical Support and Intelligence Unit (TSIU), and the Crisis Negotiation Unit (CNU). Each of these supporting functions contribute to the Tactical Section's ability to successfully respond to the ever-changing threats posed by the modern criminal or terrorist. The THU provides HRT with organic aviation support that is necessary for their specialized tactics. Similarly, the TSIU lends organic

intelligence, communication, and logistics functions. The CNU provides yet another tool to resolve an incident. Professional negotiators who are also law enforcement officers can maintain a dialogue with barricaded subjects or hostage takers, allowing time and gathering intelligence for in-depth tactical planning or possibly resolving the situation outright.

The last part of CIRG is the Strategic Information and Operations Section. It is responsible for managing the Strategic Information and Operations Center (SIOC). This is a clearinghouse for information, crisis management, and communications that functions around the clock. It allows all the elements of the FBI to access information and connect to the various other elements of the Federal government. During an incident, SIOC provides the mechanism for assets in the field to securely connect to the Director, FBI and ultimately the National Command Structure.

Clearly, the FBI has the resources necessary to investigate, coordinate, and respond to the full spectrum of terrorist threats or acts. With its personnel positioned throughout the U.S. and its territories, it can rapidly assess information and respond appropriately. Through its Tactical Section and SWAT teams, the FBI can effectively conduct arrest, detention, and search and seizure operations against targets

ranging in size from individual to large groups or cells. These operations are guided by legal and administrative guidelines that ensure the protection of people's civil liberties and preserve the evidentiary process for successful prosecutions. Whether it is a deliberate action against a threat or a response to an initiated incident, the FBI can harness the necessary assets such that the military does not need to conduct domestic law enforcement actions against suspected terrorist threats.

There are circumstances where military assistance is warranted. The vehicle for ensuring on-going and transparent discourse regarding the domestic use of the military is the Posse Comitatus Act. The healthy tension this provides helps ensure the preservation of the people's Constitutional rights. The outcomes of this discourse are the various policy documents which detail the domestic roles and responsibilities of the various Federal assets. Eliminating or decriminalizing the Posse Comitatus Act would also eliminate the discourse. Thus, the act is still very relevant in that it defines military domestic activities and is not overly restrictive due to the robust capabilities that the FBI and the civil law enforcement community can bring to bear in the fight against terrorism.

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